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MAYBAN SECURITIES SDN BHD

v.

KASSIM MAHAT

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-1549-2003]
30 JANUARY 2008

C ***CONTRACT:*** *Remisier's agreement - Indemnity - Claim for - Plaintiff's recovery of debts - Whether defendant liable to indemnify sums plaintiff failed to recover from clients pursuant to remisier's agreement - Evidence Act 1950, ss. 43, 73A*

D The plaintiff's claim in this suit was for indemnity pursuant to s. 7.02 of the Remisier's Agreement signed between the plaintiff licensed stockbroking company and the defendant, a commissioned dealer of the plaintiff. The defendant had carried out trading on behalf of clients under his care and according to the plaintiff, had
E outstanding losses of RM323,689.19 remaining unpaid. The indemnity claim in the suit included this sum plus accrued interest and other costs and expenses. The plaintiff's evidence was by a written witness statement of one Shahruddin Bhari, the assistant vice president in the credit control department of the plaintiff who
F confirmed the position of the defendant and his trading activity. The witness identified the five clients who had defaulted and testified that action was taken by the plaintiff to claim the sums due from them. Judgments were obtained against all of them and bankruptcy proceedings were initiated and they were all adjudged
G bankrupts. The defendant however submitted that the plaintiff's statement of claim did not give sufficient particulars and had failed to call evidence on all these claims in support. Also, the defendant contended that s. 90A of the Evidence Act 1950 required that a certificate from a person managing the computer must be
H produced and that statements referred to were not evidence. The defendant further argued that the five judgments obtained against the five clients were inadmissible by reason of s. 43 of the Evidence Act 1950. The defendant submitted that by not producing the original documents, the plaintiff's claim should fail.
I The defendant herein was challenging the accuracy of the records kept by the plaintiff with respect to the debts being owed by the five clients of whom the defendant in this case had agreed to indemnify under s. 7.02 of the Remisier's Agreement.

Held (entering judgment for the plaintiff):

(1) The plaintiff had proved on a balance of probability that the sums were due and outstanding from the five clients who had since been adjudicated bankrupts. The plaintiff was entitled to use the judgments obtained in the AO and RO as proof of their attempts to recover the debts. Section 43 of the Evidence Act 1950 does not operate in this case as the purpose of the production of those documents were merely to prove that action had been taken against them and not to prove the contents of the judgments. (para 9)

(2) The figures arrived at with respect to the sums owed from the five clients were derived from the statements of account maintained by the plaintiff which had been produced before the court in the bundle of documents. Section 73A of the Evidence Act 1950 allows the court the discretion to admit such documents where it is expedient to do so. (para 9)

(3) The plaintiff was entitled to the benefit of this provision in the interest of business efficacy considering that it was a large commercial establishment where the function of keeping records of its trading activities was being performed not by one employee but by many; where its superior officers may have to rely on entries made by their subordinates. As an assistant vice president in the credit control department of the plaintiff, the said Shahruddin Bhari should be in a position to know from the financial records kept by the plaintiff to be able to say that so much was outstanding in the accounts of its clients, notwithstanding that he was not himself the actual keeper of the accounts. (para 9)

(4) The defendant was therefore liable to indemnify the sums that the plaintiff failed to recover from the clients pursuant to s. 7.02 of the Remisier's Agreement. The plaintiff should be entitled to claim the accrued interests, legal costs and other expenses as these were specifically made recoverable under s. 7.02 of the said agreement. The accrued interests of 12% per annum may appear to be slightly excessive given that the interests now commonly charged by financial institutions were much lower. Nevertheless the plaintiff was entitled to charge the interests it was claiming now as it was clearly a contractual interest. (para 9)

Case(s) referred to:
Myers v. Director of Public Prosecutions [1965] AC 1001 ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 CLJ 346 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 43, 73A, 90A, 101

For the plaintiff - Rajpal Singh Ghai; M/s Affendi Zahari
For the defendant - HC Tan; M/s HC Tan & Zahani

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: ***(ex-tempore)***

[1] The plaintiff's claim in this suit is for indemnity pursuant to Section 7.02 of the Remisier's Agreement dated 9 September 1994 signed between the plaintiff licensed stockbroking company and the defendant a commissioned dealer of the plaintiff.

[2] The defendant had carried out trading on behalf of clients under his care and according to the plaintiff, had an outstanding losses of RM323,689.19 remaining unpaid as at 15 September 2003. The indemnity claim in the suit includes this sum plus accrued interests and other costs and expenses.

[3] The trial proceeded before the late Justice Dato' Abdul Wahab bin Said Ahmad who after hearing the case directed the parties to file in written submission which the parties had complied with. His early demise however prevented him from delivering the judgment in this case.

[4] In the trial only the plaintiff called evidence to prove its case. The defendant did not call any evidence to support his defence but elected to submit that the plaintiff had no case to answer.

Submission By Counsel For The Plaintiff

1. The plaintiff's evidence was by a written witness statement of Encik Shahruddin bin Bhari, the Assistant Vice President in the Credit Control Department of the plaintiff who confirmed the position of the defendant and his trading activity. See pp. 1 to 6 of exh. "P1" paras 1 to 15.

2. The witness identified the five clients who had defaulted and testified that action was taken by the plaintiff to claim the sums due from them. (See pp. 8 to 10, 13 to 16 paras 22 to 30 and paras 36 to 38.) Judgments were obtained against all of them and bankruptcy proceedings were initiated and they were all adjudged bankrupts.

3. The defendant was at all times informed of the process of recovery. He did not object to the steps taken by the plaintiff to recover the sums due from the five clients which he served. See pp. 18 to 21 paras 44 to 57. On the contrary the defendant had replied seeking the plaintiff's indulgence for time to pay. See letters dated 25 September 1997, 1 July 1998 and 30 July 2003.

4. In so far as the trading activity of the five clients is concerned which resulted in the figure RM323,689.19 (the principal sum being claimed) the witness confirmed all contract notes were duly sent to the clients at their mailing address and are not available for production before this court. *In lieu* thereof the plaintiff produced a statement of account in respect of each client detailing the activity of the trading which were prepared by the Accounts Department of the plaintiff (see Bundle B pp. 314 to 326). The witness also produced a financial statement of indebtedness pursuant to Section 7.04 of the Remisier's Agreement which the defendant had signed and which binds the defendant to admit the sums owed as conclusive after being served with this statement.

5. The claims on other costs and expenses are provided for in Section 7.02 of the Remisier's Agreement which read as follows:

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Section 7.02 Indemnity in Connection with Misconduct of Remisier and His Clients

Without prejudice to the generality of Section 7.01 above the Remisier shall at all times hereafter indemnify and keep the Company indemnified against all actions proceedings
B liabilities claims demands losses cost (including legal costs on a solicitor and client basis) damages penalties and expenses whatsoever which may be suffered sustained or incurred by the Company arising from or in connection with any transaction concluded by the Remisier including
C without any limitation arising as a result of any fraudulent act, default, omission, misconduct or adverse act on the part of the Remisier and the Remisier's Clients such as the delivery of any forged, stolen or invalid securities and/or transfer and the fraudulent amendment of cheques issued by the Company in favour of the Remisier's clients.

D

6. The defendant had been kept informed of the costs and expenses of the legal proceedings which had been incurred from time to time by the plaintiff in its attempt to recover the sums owed from the five clients. See p. 24 of exh. "P1" para
E 65.

7. The interests element in the claim is based on Section 7.04 of the Remisier's Agreement which is fixed at 12% per annum on the principal sum owed as at 16 September 2003 (from the
F date of the statement of claim). With respect to accrued interests on the principal sum this has been computed into the accounts of the respective clients and is provided for under the same section.

[6] Submission By Counsel For The Defendant (Verbatim)

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1. Paragraph 5 of the statement of claim did not give sufficient particulars. The claim is for RM323,689.19 being the claim for the principal sum. The second amount claimed is in respect to interests accrued in the sum of RM351,397.80. The third
H amount is for legal fees and other charges as at 15 September 2003 for the sum of RM40,986.53 and interests at 12% per annum and costs. The plaintiff failed to call evidence on all these claims in support. It must be noted that there are only two exhibits in this case – "P1" and "P2". Exhibit "P1" is the
I witness statement of Shahruddin bin Bahri. Exhibit "P2" is the change of remisier audit trail. All the documents inside the

bundle are not marked. The said witness was only an Assistant Vice President in the Credit Control Department of the plaintiff. He talked about dealing chits in the sale and purchase of shares to be implemented, that contra notes and contra statements are important in proving the case and they were not tendered although they can be taken out if required by the company. In the event this court would not be in a position to assess how much was owed, only statements were referred to but not marked. Also s. 90A of the Evidence Act 1950 requires that a certificate from a person managing the computer must be produced. Statements referred to are not evidence.

2. The five judgments obtained against the five clients are inadmissible by the reason of s. 43 of the Evidence Act 1950. Section 43 deals with judgments. The judgments relate to the five clients. They are also not tendered as exhibits.

3. The damages must be proven. See s. 101 of the Evidence Act 1950. The plaintiff says their claims are based on contra notes and contra statements but these are not produced. By not producing the original documents, plaintiff's claim should fail. See *Popular Industries Limited v. Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360 per Edgar Joseph Jr J at 361 Held:

> (6) It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover the damages. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract. And, where damage is shown but its amount is not proved sufficiently or at all, the court usually decrees nominal damages.
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> (7) Where, as here, the claim is for the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given.
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> (8) As the relevant accounts books of the plaintiffs were never produced, the oral evidence of the accountant and exh P76 were rendered inadmissible. It did not make any difference that counsel for the defendants never called for

production of the accounts books since the defendants never agreed to dispense with formal and proper proof of the loss of profits.

(9) It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say the production of the documents itself, is essential. The burden of proving the existence of any circumstances bringing the case within any of the exceptions lies upon the party seeking to adduce secondary evidence of the contents of the document. In the present case, the plaintiffs made not the slightest attempt to discharge that burden, with the result that exh P76, which was alleged to be extracted from the books of accounts of the plaintiffs which were never produced, was inadmissible in evidence. Similarly, the oral evidence of the accountant which was based on exh P76 was also inadmissible for the same reason.

(10) It is settled law that inadmissible evidence does not become admissible simply by reason of failure to object to its admission.

(11) Even had the accounts books been in evidence, they could not by themselves have been sufficient to charge the defendants with liability, having regard to the provisions of s. 34 of the Evidence Act, so that the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts.

4. For that reason we stuck our neck out and opted not to call evidence since plaintiff had failed in this case as it had introduced inadmissible evidence.

[7] Reply

1. The *Popular Industries* case could be distinguished on the following grounds:

i) In *Popular* the claim is for loss of profit which has to be assessed as general damages as opposed to the claim in the instant case which is a claim for actual debts owed by clients to the plaintiff to which the defendant is liable to indemnify;

ii) Further in *Popular* the defendant had disputed the existence of the contract with the plaintiff as opposed to the present case which the defendant does not dispute the existence of the contract in writing with the plaintiff.

2. Section 43 does not apply for the reasons that the judgments obtained by the plaintiff against the clients would show the plaintiff had taken the necessary action to mitigate the losses before commencing the present suit against the defendant. They are therefore relevant.

3. The plaintiff did not produce the dealing chits for the reason that they had been destroyed after seven years as in the normal course as a matter of policy. The chits were irrelevant in any case as the defendant does not deny that such transactions had been carried out.

4. The contract notes cannot be produced as the original are sent out to the clients. Only statements can be provided. There was no notice to produce the contract notes before the trial.

5. There are two reasons why the documents in Bundle B were not marked as exhibits:

i) The exhibits were found in the Common Agreed Bundle of Documents which had been agreed. See notes of evidence of the late Abdul Wahab J dated 28 September 2006 which read as follows:

> Pihak-pihak bersetuju dokumen dalam Bundle B tidak dipertikaikan kewujudannya (existence of documents not disputed) dan tertakluk kepada soalbalas.

It is clear here the parties are agreed that the whole Bundle B is to be reclassified as documents to be admitted subject to cross examination. The defendant in this case did not cross examine on the documents in Bundle B. His cross examination was restricted to the general issues of contract notes, dealing chits.

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Findings And Decision

[8] Having heard the submission of the parties, it is clear that all that the defendant is challenging is the accuracy of the records kept by the plaintiff with respect to the debts being owed by the
B five clients of whom the defendant in this case had agreed to indemnify under Section 7.02 of the Remisier's Agreement.

[9] It is also clear that the plaintiff had proved on a balance of probability that:

C 1. The sums were due and outstanding from the five clients who had since been adjudicated bankrupts. The plaintiff is entitled to use the judgments obtained in the AO and RO as proof of their attempts to recover the debts. Section 43 of the Evidence Act 1950 does not operate in this case as the
D purpose of the production of those documents were merely to prove that action had been taken against them and not to prove the contents of the judgments.

2. The figures arrived at with respect to the sums owed from the
E five clients are derived from the statements of account maintained by the plaintiff which had been produced before the court in the bundle of documents.

It is true that under the common law such an evidence can
F only be accepted by the court if the maker of the documents is called. See *Myers v. Director of Public Prosecutions* [1965] AC 1001 but the law has since undergone a change in England and in our jurisdiction by s. 73A of the Evidence Act 1950 which allows the court the discretion to admit such documents
G where it is expedient to do so. Section 73A reads as follows:

> **73A. Admissibility of documentary evidence in civil cases, etc.**
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> (1) Notwithstanding anything contained in this Chapter, in
H any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
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> I (a) if the maker of the statement either:

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence –

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document, or the material part thereof, was written, made or produced by him with his own hand, or was signed or initialled by him, or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(7) For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

In my view the plaintiff is entitled to the benefit of this provision in the interest of business efficacy considering that it is a large commercial establishment where the function of keeping records of its trading activities is being performed not by one employee but by many; where its superior officers may have to rely on entries made by their subordinates.

As an Assistant Vice President in the Credit Control Department of the plaintiff, Encik Shahruddin bin Bhari should be in a position to know from the financial records kept by the plaintiff to be able to say that so much is outstanding in the accounts of its clients, notwithstanding that he was not himself the actual keeper of the accounts.

3. The defendant is therefore liable to indemnify the sums that the plaintiff failed to recover from the clients pursuant to Section 7.02 of the Remisier's Agreement.

4. The plaintiff should be entitled to claim the accrued interests, legal costs and other expenses as these are specifically made recoverable under the Section 7.02. The accrued interests of 12% per annum may appear to be slightly excessive given that the interests now commonly charged by financial institutions are much lower. Nevertheless the plaintiff is entitled to charge the interests now it is claiming as it is clearly a contractual interest. See Siti Norma Yaakob JCA in *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346.

[10] Judgment is entered for the plaintiff with costs.